COUNCIL OF THE EUROPEAN UNION

Brussels, 7 October 2013

14547/13

Interinstitutional File: 2013/0253 (COD)

LIMITE

JUR 523
EF 189
ECOFIN 867
CODEC 2224

OPINION OF THE LEGAL SERVICE (*)

Subject: Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council

- Delegation of powers to the Board

I. INTRODUCTION

1. The Commission presented on 10 July 2013 a proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (hereinafter, "the Proposal")[1].

(*) **This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.**

1 COM(2013) 520 final, doc. 12315/13.

The Proposal is strongly linked to the Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (hereinafter, "the BRRD Proposal")[2].

2. The Proposal creates a Single Resolution Mechanism (hereinafter, "the SRM") that will be in charge of applying a set of uniform rules on resolution defined by the Proposal itself. Powers of resolution are conferred upon the Commission and the Board that would be a newly created EU agency with full legal personality. National resolution authorities would be in charge of executing certain resolution actions adopted by the Commission and by the Board.

3. The Ad hoc Working Party on the Single Resolution Mechanism requested during its meeting of 19 July 2013 the opinion of the Council Legal Service (CLS) on whether the delegation of powers to the Board envisaged in the Proposal is compatible with the EU Treaties and the general principles of EU law, as interpreted by the so-called *Meroni* case-law of the Court of Justice of the European Union (the Court)[3].

4. This opinion answers that question[4].

---

[2] At the moment of drafting this opinion, the BRRD proposal is still under discussion between the co-legislators. See text of the general approach of the Council at Council doc. nº 11148/1/13 REV 1.

[3] See Court judgments of 13 June 1958, 9/56, Meroni, [1957 and 1958] ECR 133, of 14 May 1981, 98/80, Romano [1981], ECR 1241, and of 12 July 2005, Alliance for Natural Health, joined cases C-154/04 and C-155/04, ECR [2005] P. I-06451. The *Meroni* judgment was issued in the context of the European Coal and Steel Community (ECSC) Treaty (which is not in force any more) and concerned the validity of decisions of bodies established under Belgian private law adopted on the basis of a conferral of powers by the ECSC High Authority.

[4] It is recalled that the CLS has already issued a first opinion on the Proposal, which is specifically focused on the legal basis thereof (doc. 13524/13).

II. LEGAL BACKGROUND

5. In the long-standing absence of specific Treaty provisions on the issue, the legal framework for the conferral of powers on agencies has been mainly set through the case law of the Court.

6. The *Meroni* case-law can be summarised as follows: 1) no delegation can be presumed and thus an explicit decision to delegate must be taken; 2) a delegation of powers cannot be excluded even in the absence of a specific basis for it in the Treaty; 3) any delegation of powers where the conferred powers are broader than those of the delegating authority is unlawful; 4) a delegation involving "*discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*" would imply an illegal transfer of responsibility by substituting the choices of the delegator by those of the delegate and by altering the balance of powers thus doing away with the guarantee granted by the Treaty to undertakings[5]; and 5) powers to carry out assessments under own authority should be subject to precise rules in order to avoid arbitrary results and to make review of those assessments possible.

7. The *Meroni* case-law has been supplemented by further case-law, from which the following elements emerge:

   - a confirmation of the fact that a delegation by the legislature must ensure that the power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria, which may nevertheless be contained in Recitals[6] or in an agreement with the body in question[7];

---

5 The Court did not refer in *Meroni* to the concept of "*institutional balance*", which would be later developed, but to that of "*balance of powers*", which was relevant in that case insofar as it provided a guarantee to market operators.

6 Case C-154/04 *Alliance for Natural Health* (pp. 90-92).

7 Judgment of 19 February 1998, in cases T-369/94 and T-85/95 Dir International Film (ECR 1998 p. II-357 pp. 52, 69, 91-93).

- there is a general power of the institutions to delegate powers to other bodies[8];

- a delegation of implementing powers is lawful under Union law, provided that it is not formally prohibited by any legislative provision[9].

8. It results from the above that a body created by the secondary law of the Union may not be delegated tasks under conditions that would deprive the institutions of the Union of the competences vested upon them by the EU Treaties. This would be contrary to the principles of institutional balance and of conferral of powers to the institutions, as enshrined in the case law of the Court and the EU Treaties[10].

9. The discretionary power to define the policy of the Union in a given field must therefore be retained by the institution or body designated for this purpose by the Treaties. This involves in particular the following:

- an agency may not supplement the EU legislative framework by means of measures of a general scope. It may however, in principle, adopt non-legally binding acts (such as opinions, guidelines or recommendations) that the relevant authority may take into account at its convenience ;

- an agency may not be left to adopt implementing acts of an individual scope without being subject to rules, criteria and standards, the absence of which could lead in practice the agency to establish the policy of the Union.

10. Accordingly, a body or agency created by an act of secondary legislation may be empowered to adopt legally binding measures of an individual scope as long as its powers are not discretionary, in the sense that the exercise of those powers must result from the application of a given set of well defined legal rules to a particular factual situation.

---

8 Judgment of 26 May 2005 in case C-301/02 P Tralli (ECR 2005 p. I-4071 p. 41).

9 Judgment of 18 October 2001 in case T-333/99 X v ECB (ECR 2001 p. II-3021, ECR-SC p. I-A-199, II-921, pp. 102-106).

10 Judgment of 22 May 1990, in case C-70/88, Parliament/Council [1990] Rec. I-2041, at p. 21. The principle of conferral of powers of the EU institutions is laid down in Art. 13(2) of the Treaty on European Union (TEU).

11. It is also recalled that the conferral on a Union body or agency of a certain power of assessment, however complex it may be, to subsume facts into rules so that it adopts an individual decision, does not necessarily amount to a wide margin of discretion to make policy choices, in the sense of the *Meroni* case-law. What is essential is that policy choices are made by the EU institutions, typically in the act where such powers are given to Union bodies or agencies, irrespective of the fact that a capacity to judge facts and circumstances and to integrate them into the relevant rules rests with said bodies or agencies[11]. The discretionary element inherent to the legal or technical characterisation of facts at the core of the process of making decisions of an individual character is in any case to be distinguished from the broad discretion reserved to institutions by the case-law.

[11] See, for illustration, the European Chemicals Agency and the power of assessment when adopting individual executive decisions granted under Art. 9, 40(3) and 51 of Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC; the Office for the harmonisation of the Internal Market (trade marks and designs) and the powers of assessment when adopting individual executive decisions in respect of trade marks and designs granted by Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark; the European Medicines Agency, and the power of assessment when adopting individual executive decisions granted by Art. 7 of Regulation (EC) No 1901/2006 of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004. In the financial services area, the European Supervisory Authorities (ESAs) have been granted the power to settle disagreements between national competent authorities in cross-border situations, where the legislator considers such a mediation necessary (see, for illustration, Art. 19 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC) and the European Securities and Markets Authority has been granted the power to impose fines on credit rating agencies (see Art. 36a of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies as subsequently modifies).

III. LEGAL ANALYSIS

12. Powers of resolution under the Proposal are allocated to the Commission and to the Board. National resolution authorities are called to execute a number of decisions adopted by both the Commission and the Board.

13. The powers of the Commission under the Proposal would be the following: placing under resolution an institution or a group; establishing the framework for the use of the resolution tools and for the use of the Fund in a specific situation of resolution; deciding whether and how the powers to write down or convert capital instruments are used; and adopting delegated acts which will specify further criteria or conditions to be taken into account by the Board in the exercise of its different powers.

14. As for the Board, a wide range of powers is proposed to be conferred on it. Bearing in mind their addressees, the Proposal foresees several types of actions for the Board: the latter would recommend to the Commission certain decisions[12]; it would take decisions addressed to the national resolution authorities[13] or directly to institutions (or groups) entering in the scope of application of the Regulation[14]; and it would take decisions related to the administration and the use of the Fund. The Board would therefore intervene at different stages of the resolution process. More particularly, it would be granted a number of resolution powers as regards: (a) the so-called preventive phase, (b) the resolution phase, (c) the Resolution Fund, and finally (d) sanctioning powers.

---

[12] See, for illustration, Art 16(5): the Board recommends to the Commission to place an entity under resolution.

[13] The decisions addressed to national resolution authorities take the form of instructions. See, for illustration, Art 8(9), Art 10(7) or Art 36(1) of the Proposal.

[14] See, for illustration, Art 9 or Art 26(2) of the Proposal.

15. The present opinion will examine whether the powers which would be conferred to the Board in the different stages of the resolution process, as set out in the previous paragraph, are compatible with the EU Treaties, and in particular with the general principles of EU law, as interpreted by the *Meroni* case-law. The following examination will revolve around the question whether the exercise of such powers would effectively amount to establishing the resolution policy of the Union or whether, on the contrary, the said powers would correspond to a technical function ancillary to such resolution policy that should be established in the Proposal and/or at a later stage by the institutions of the Union themselves.

16. For the purposes of the present opinion, the resolution policy of the Union should be understood as the set of conditions and criteria under which a failing entity may be placed under resolution and the tools and financial means to be used for that resolution to take place, as well as the balancing of the different objectives and interests at stake, i.e. non exhaustively the preservation of financial stability, the safeguarding of the internal market in the field of financial services, the continuation of critical functions of the entity resolved, the determination of the order of priority of creditors and the use of public funds.

17. The Council Legal Service will only focus on the matters for which the Board would have the power to adopt legally binding decision. Were the Board simply to address recommendations to the Commission, the eventual policy choice would rest with the Commission and there could be no incompatibility with the *Meroni* case-law.

a) Intervention of the Board in the preventive phase

18. The Proposal foresees the following tasks for the Board:

    i) the drafting (including its review and its updating) of the resolution plan for the entities referred to in Art. 2 of the Proposal (Art 7). Within the context of the drafting of the resolution plan, the Board shall determine the minimum requirement for own funds and eligible liabilities in accordance with Art 10;

ii) the possibility to grant simplified obligations or waivers in relation to the drafting of the resolution plan (Art. 9);

iii) the preparation for the resolution of the entity or group concerned through early intervention (Art. 11).

i) Drafting of the resolution plan

19. The resolution plan should provide for the possible actions to be taken both by the Commission and by the Board in case of resolution. It would be prepared by the Board in cooperation with the relevant competent and resolution authorities and would set out options for applying the resolution tools and for using the resolution powers. Art. 7(5) further specifies the content of the resolution plan. Most of the elements to be contained in the plan are of factual or technical nature and their assessment would not entail the exercise of a wide margin of discretion[15]. However, some of them (the assessment of resolvability[16] and the determination of the minimum requirement for own funds and eligible liabilities, or, where appropriate, contractual bail-in instruments[17]) require further examination.

20. Contrary to other elements of the resolution plan that have a preparatory nature and do not deploy their effects before the institution or the group is placed under resolution, the assessment of resolvability and the determination of the minimum requirement are producing their own legal effects already in the preventive phase.

---

[15] The summary of the key elements of the plan and the summary of the material changes that have occurred in the recent past (points a) and b) of Art. 7(5)) are of pure factual nature. The demonstration of how critical functions and core business line could be legally and economically separated (point c), the estimation of the timeframe for executing each element of the plan (point d), the description of different procedures (points g), h), n)) and options (points j) and m)) or the assessments implied by points i), k), l), q) and r) are of a purely technical nature, although they may be complex.

[16] Art 7(5) points (e) and (f).

[17] Art. 7(5) points (o) and (p).

21. According to Art. 8, the Board should conduct an assessment of resolvability when drafting resolution plans. This assessment should allow the Board, in accordance with paragraph 5 of that provision, to identify possible substantive impediments to the effective application of the resolution tools and the exercise of the resolution powers and, ultimately, to instruct the national resolution authorities to take very intrusive measures against the entity or the group concerned[18].

22. While having a technical nature, the assessment of resolvability has a direct incidence on the resolution action. It is a central element of the resolution planning which constitutes, according to Recital 24 of the Proposal, "*an essential component of the effective resolution*". The Board should therefore not be left with a wide margin of discretion for the application of resolvability criteria to individual institutions or groups which would impinge on a fundamental aspect of the resolution policy of the Union as defined in paragraph 16 above.

---

[18] According to Art. 8(9),
"*the Board shall instruct national resolution authorities to take any of the following measures :*
- *(a) to require the entity to draw up service agreements (whether intra-group or with third parties) to cover the provision of critical functions;*
- *(b) to require the entity to limit its maximum individual and aggregate exposures;*
- *(c) to impose specific or regular information requirements relevant for resolution purposes;*
- *(d) to require the entity to divest specific assets;*
- *(e) to require the entity to limit or cease specific existing or proposed activities;*
- *(f) to restrict or prevent the development of new or existing business lines or sale of new or existing products;*
- *(g) to require changes to legal or operational structures of the entity or any entity belonging to a group, either directly or indirectly under its control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;*
- *(h) to require an entity to set up a parent financial holding company in a Member State or a Union parent financial holding company;*
- *(i) to require an entity to issue eligible liabilities to meet the requirements of Article 10;*
- *(j) to require an entity to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the Commission to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument.*"

23. The criteria provided by the Proposal for its exercise to take place are not specific enough to ensure that the Board will not encroach upon the exclusive power of the institutions to establish the resolution policy of the Union. Indeed, the criteria provided for in Art. 8(2), (3) and (8) [19] for the Board to carry out its assessment of resolvability are of a rather general nature founded on undetermined legal concepts that would leave in the hands of the Board the capacity to determine when the companies are resolvable, such as the circumstance that the entity or group of entities are susceptible of being subject to insolvency or resolution proceedings "*without giving rise to significant adverse consequences for financial systems, including circumstances of broader financial instability or system wide events*"[20]. Moreover, according to paragraph 4 of the same provision, the Proposal only sets a minimum list of matters that the Board would have to examine for the purpose of the assessment and no indication is provided on the grounds or the situations where the Board may decide to complete this list.

24. The establishment of the minimum requirement for own funds and eligible liabilities aims at ensuring that institutions always have sufficient loss-absorbing capacity. It has a preventive effect and contributes more specifically to the effectiveness of the bail-in tool, as underlined by Recital 45 of the Proposal. The determination of the minimum requirement therefore represents an essential aspect of the resolution policy of the Union.

---

[19] The decision of the Board on the suitability of the measures proposed to remove the impediments to the resolvability should be based on the following criteria in accordance with Art 8(8) : "(*a) the effectiveness of the measure in removing the impediments to resolvability; (b) the need to avoid a negative impact on financial stability in participating Member States;(c) the need to avoid an impact on the institution or the group concerned which would go beyond what is necessary to remove the impediment to resolvability or would be disproportionate*."

[20] Art. 8(2) and Art 8(3).

25. According to Art. 10(1), the Board would be granted the power to determine, for each institution and parent undertaking, the minimum requirement as a percentage of the total liabilities and own funds, excluding liabilities arising from derivatives, on the basis of six criteria laid down exhaustively in Art. 10(3). However specific these criteria may be, the Proposal does not contain any specific guidance and limitation on the effective determination by the Board of the minimum requirement[21]. Hence, it cannot be foreseen which minimum requirement the Board would concretely impose on a specific institution or group. The determination of the minimum requirement as foreseen in the Proposal may therefore entail a wide margin of discretion for the Board that would allow it to determine a fundamental aspect of the resolution policy of the Union. The CLS also recalls that, according to Art. 39(6b) of the BRRD Proposal, the Commission would be invited to present a legislative Proposal on the harmonised application of the minimum requirement[22]. If, in the BRRD context, the Council has considered the minimum requirement to be of such importance as to deserve a legislative intervention, it is difficult to see, in the SRM context, how the power to establish it without having an adequate framework could be conferred on the Board.

26. A consideration similar to the one made in the previous paragraph can be made in respect of the power of the Board to provide that the minimum requirement is partially met through contractual bail-in instrument, as laid down in Art. 10(4) of the Proposal. There is no specification of the conditions pursuant to which the Board would take account of contractual bail-in instruments as part of the minimum requirement, nor of the weight that such contractual instruments would represent in respect of the totality of minimum requirements.

---

[21] This could be made by establishing maximum and minimum thresholds for the percentage to which Art. 10(2) of the Proposal refers.

[22] According to that provision: " *this shall include, where appropriate, proposals for the introduction of an appropriate number of minimum levels of the minimum requirement, taking account of the different business models of institutions and groups. The proposal shall also include any appropriate adjustments to the parameters of the minimum requirement, and if necessary, appropriate amendments to the application of the minimum requirement to groups.*"

ii) Simplified obligations or waivers in relation to the drafting of the resolution plan

27. The conferral upon an agency of powers to exempt from or modify the intensity of the application of the rules laid down in a basic legislative act must be framed in very precise terms in order to avoid that such an agency freely alters the scope of application of that act and therefore makes a policy choice that may only be vested in the institutions of the Union.

28. Art. 9 of the Proposal does not sufficiently provide for the circumstances and conditions under which the Board may apply simplified obligations and waivers in relation to the drafting of the resolution plan.

29. First, as regards waivers, the CLS acknowledges that paragraphs 4, 5 and 6 of Art. 9[23] establish a minimum framework as they identify the situations when such waivers may be agreed, although there is no automaticity for the Board to grant such waivers.

[23] Paragraphs 5 and 6 of Art. 9 identify two concrete situations where waivers may be granted by the Board: the affiliation of an individual institution to a central body as in Art. 21 of Directive 2013/36/EU and wholly or partially exempted from prudential requirements in national law in accordance with Art. 2(5) of Directive 2013/36/EU or the affiliation of an individual institution to an institutional protection scheme in accordance with Art. 113(7) of Regulation (EU) No 575/2013. Paragraph 4 of Art. 9 specifies that waivers may not be granted in cross-border situations.

30. Second, the only criteria for the application of simplified obligations are those referred to in Art. 9(3): "*the potential impact that the failure of the institution or group could have, due to the nature of its business, its size or its interconnectedness to other institutions or to the financial system in general, on financial markets, on other institutions or on funding conditions*"[24]. These criteria consist however of undetermined legal concepts deprived of the accuracy necessary to frame the powers of an agency of the Union.

31. It is therefore difficult to assess, on this basis, with a sufficient degree of accuracy the manner in which the Board will grant the waivers and simplified obligations. Under the present wording, the Board would be vested with the power to determine the scope of application of the provisions concerning the elaboration of resolution plans, thus impinging on the powers that may only correspond to the institutions of the Union.

iii) Preparation for the resolution of the entity or group concerned through early intervention

32. Concerning the early intervention phase (Art. 11), the CLS' view is that the actions the Board would take have only a preparatory nature in view of the resolution of the entity or group concerned. Indeed, according to paragraph 3 of that provision, the Board would be able to require information, carry out a valuation[25], contact potential purchaser or require the national resolution authority to draft a preliminary resolution scheme. The Board would also have the power, in this phase, to monitor, together with the competent authority, compliance with the early intervention measures.

[24] See Art. 9(3).

[25] According to Art. 17(14), the valuation "*shall not have any legal effect and be a procedural step preparing for the recommendation of the Board to apply a resolution tool or exercise a resolution power*".

33. Those powers would also be preparatory or of a purely technical nature. In the view of the CLS, they would not amount to exercising any policy choice or would not entail a wide margin of discretion within the meaning of the *Meroni* case-law.

34. In view of the above, the CLS considers that the Proposal should either provide for further specifications as to the manner in which the Board may exercise its powers relating to the drafting of the resolution plan[26], or otherwise involve in the exercise of that power an institution of the Union vested with executive competences.

b) Intervention of the Board in the resolution phase

35. The provisions and powers laid down under Chapter 3 of the Proposal are at the core of the resolution policy of the Union. Under Chapter 3, the EU legislature would fix the fundamental parameters of the resolution policy of the Union: the objectives and principles of resolution (Art. 12 and 13), the resolution procedure (Art. 16), the different resolution tools as well as the general principles of their use (Art. 19 to 24), and the general criteria for the implementation of resolution (Art. 15 to 18).

36. However, Chapter 3 of the Proposal does not exhaust the boundaries of the resolution policy of the Union. Indeed, the application of the resolution provisions under Chapter 3 involves decisions and assessments that carry with them the making of resolution policy. This is the case of the weighting of the different objectives at stake foreseen in Art. 12[27], the choice of the most suitable resolution tools, or the very decision to place an institution or group under resolution.

---

[26] The Commission could be empowered to further specify such criteria in a delegated act.

[27] According to Art. 12(2), the resolution objectives are : " *(a) to ensure the continuity of critical functions; (b) to avoid significant adverse effects on financial stability, including to prevent contagion, and maintain market discipline; (c) to protect public funds by minimising reliance on extraordinary public financial support; (d) to protect depositors covered by Directive 94/19/EC and investors covered by Directive 97/9/EC*".

37. The Proposal would grant to the Commission and to the Board the power to decide on the concrete resolution of the entities concerned. The question to be answered is whether, under the allocation of tasks operated by the Proposal, the functions of the Board are of a purely technical nature or whether they would rather constitute resolution policy making.

38. The Proposal entrusts the Commission with the prerogative to decide on the fundamental conditions and parameters of a concrete resolution action. Pursuant to Art. 14, 16(6) and 16(7), the Commission would have the power to decide whether an entity is placed under resolution, the power to decide on the use of the resolution tools through the so called "*resolution framework*" and the power to decide on the use of the Resolution Fund (see also Art. 25(3) [28]). The Commission would also have the exclusive power to balance resolution objectives (Art. 12(3)) and would be exclusively entrusted with the decision whether the use of the Fund is compatible with the criteria for the application of State aid under the Treaties (Art. 16(10)). Lastly, according to Art. 15 and 18, the Commission would decide on the write down and conversion of capital instruments.

39. The Board, in turn, is allocated a large number of powers that can be overall regarded as of a purely executive nature:

- the power to address recommendations to the Commission to put an institution or group under resolution, while the latter remains sovereign to adopt or not to adopt the decisions recommended by the Board[29].

- the power to adopt the resolution scheme within the limits of, and in compliance with, the resolution framework previously fixed by the Commission[30].

---

28 Pursuant to Art. 25(3) the Commission would also have the power to review its initial decision where it is necessary in order to achieve the resolution objectives

29 Art. 16(5) and (6) of the Proposal.

30 See Art. 16(8) and 20 of the Proposal. Moreover, according to Recital (36) : "*the Commission should provide the framework for the resolution action to be taken depending on the circumstances of the case and should be able to designate for use all necessary resolution tools. Within that clear and precise framework, the Board should decide on the detailed resolution scheme. […]. The framework should also make it possible to assess whether the conditions for the write-down and conversion of capital instruments are met*.".

- the power to monitor the execution of its resolution scheme by the national resolution authorities (Art. 25) on the basis of which it can address instructions to the latter[31].

40. The manner in which the Board would implement the resolution tools referred to in Art. 21 to 24 of the Proposal deserves however special consideration.

41. First, Art. 21(2), 22(2), 23(2) and 24(2) contain non-exhaustive lists of measures that the Board would be required to include in the resolution scheme. This is not sufficient to foresee with enough certainty the specific decisions of the Board in a given situation since no criteria regarding how other actions would be included in the resolution scheme, for instance, are contained in the Proposal.

42. Second, as far as the bail-in-tool is concerned, the discretionary power of the Board under Art. 24(5) to exclude totally or partially certain liabilities from the application of the write-down and conversion powers contains a degree of flexibility that goes beyond the powers that may be conferred to an agency[32].

---

[31] The Board's power of monitoring is however a corollary of the power to establish the resolution scheme out of which limits it cannot be exercised. The power of monitoring shares therefore the same - technical nature - than the power to establish the resolution scheme on which it is rooted.

[32] According to Art. 24(5), "*In exceptional circumstances, certain liabilities may be excluded or partially excluded from the application of the write-down and conversion powers in any of the following circumstances:*

(a) Where it is not possible to bail-in that liability within a reasonable time notwithstanding the good faith efforts of the resolution authority; or

(b) Where the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions; or

(c) Where the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion that would severely disrupt the functioning of financial markets in a manner that could cause a serious disturbance to the economy of a Member State or of the Union; or

(d) Where the application of the bail-in tool to these liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if these liabilities were excluded from bail-in… "

43. A similar consideration may be made in respect of the powers of the Board under Art. 26(2), whereby the Board could directly order an institution under resolution to take certain measures if the national resolution authority has either omitted to apply a decision in the resolution procedure or has applied it in a manner that fails to achieve the resolution objectives. While the types of measures the Board would order to the institution concerned are clearly defined, the Board would be left, under this provision, with the power to assess the compatibility of the national resolution authorities' intervention with the four objectives of rather general nature referred to in Art. 12(2). Such an assessment entails a margin of discretion that may be considered "*wide*" within the meaning of the *Meroni* case-law.

44. In view of the above, it may be concluded that the general economy and structure of the Proposal, whereby the Commission would be endowed with the power to adopt the basic resolution decisions and the Board would be held to act within the criteria laid down by the Commission itself, is in conformity with the Union law as interpreted by the *Meroni* case law. However, the powers of the Board to implement the resolution tools and decisions seem at certain instances to be of a rather discretionary nature, thus going beyond the exercise of purely technical powers. It would therefore be necessary either to include in the Regulation further specifications, in order to properly frame the application by the Board of the resolution tools [33], or involve in the exercise of those powers an institution of the Union vested with executive competences.

45. It goes without saying that the requirement for there to be an adequately precise framework for the execution of Union policies and for an involvement of the Union institutions whenever a policy-making choice has to be made are, however, not to be regarded as mutually exclusive alternatives; both approaches need to be combined in order to respect the case-law on the prerogatives and due process of the institutions and other EU bodies.

[33] The Commission could be empowered to further specify such criteria in a delegated act.

c) Powers of the Board related to the Resolution Fund

46. The Resolution Fund represents the second pillar of the Proposal and it would provide the necessary financing for the resolution action pursuant to a number of pre-defined criteria. The Fund would be fed by ex ante and ex post contributions to be paid by the entities covered by the Proposal. It would also be able to borrow, under certain conditions, from all other resolution arrangements within non-participating Member States or to contract borrowings or other forms of support from financial institutions or other third parties.

47. The significance of the Resolution Fund in the Single Resolution Mechanism is clearly underlined in the explanatory memorandum to the Proposal: "*the Fund creates a private external layer which can provide mid and long-term funding to avoid or minimise the use of public money in resolving banks. Moreover, it increases the effectiveness of the resolution process by preventing coordination issues that arise in the deployment of national funds, especially in the case of cross-border groups.*"[34]. According to Recital (57) of the Proposal, "*the effectiveness of the resolution tools applied may depend on the availability of short-term funding for the institution or a bridge institution, the provision of guarantees to potential purchasers, or the provision of capital to the bridge institution*".

48. Under the Proposal, the Board would have extensive powers related to the constitution, the administration and the use of the Fund. The Board would decide on the following matters:

i) the individual contributions of entities;
ii) the extension of the period for reaching the target funding level;
iii) the borrowing or the alternative funding means;
iv) the investments;
v) the use of the Fund in a resolution procedure.

[34] Page 14 of the Proposal.

49. It is necessary to examine whether each of these powers entails a wide margin of discretion within the meaning of the *Meroni* case-law.

i) Individual contributions of entities

50. According to Art. 62(5), the Commission should adopt a delegated act establishing the criteria for the calculation of all types of contributions. The Commission would determine the type of contributions and the matters for which contributions are due, the manner in which the amount of the contributions is calculated, the way in which they are to be paid, the contribution system for institutions that have been authorized to operate after the Fund has reached its target level and the annual contributions necessary to cover the administrative expenditure of the Board before it becomes fully operational.

51. Moreover, in conformity with Art. 66(3), the Commission should specify, by delegated acts, the method of calculation of individual contributions and, in conformity with Art. 66(1), the criteria for the adjustment of the contributions to the risk profile of each institution.

52. On the basis of this very detailed framework to be specified later on by the Commission, the Board would determine the individual contributions of entities according to Art. 62(3). The decisions of the Board related to the calculation of the individual contributions could therefore be considered as being of a purely executive nature, since there is no margin of discretion that would be left following the adoption by the Commission of the delegated acts referred to above.

53. However, as regards the payment of contributions, a certain degree of ambiguity exists concerning the set of rules to be applied by the Board in accordance with Art 62(3), second sentence. It is not clear whether those rules are only those to be laid down by the delegated acts under paragraph 5 or whether the Board could adopt rules going beyond those delegated acts. Indeed, the current drafting of the text does not exclude that the Board would enjoy a wide margin of discretion when applying or even establishing the rules referred to in Art. 62(3).

54. Concerning the extraordinary ex post contributions, while their amount would be specified by the Board under the very precise framework provided by the Commission referred to above, the decision whether there is a need for such contributions is entrusted to the Board. The Board should raise them according to Art. 67(1) "*where the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the Fund*". The Proposal does not specify the situations when the available means would be considered insufficient and therefore it leaves a wide margin of discretion to the Board in this respect. The Board would also enjoy a wide margin of discretion for granting exemptions under Art 67(2), even though the Commission, by delegated acts, would be empowered to specify the circumstances and the conditions for those exemptions. Indeed, Art 67(2) foresees only a mere possibility and not an automatic obligation for the Board to grant exemptions to individual institutions.

ii) Extension of the period for reaching the target funding level

55. As indicated in Recital (60) of the Proposal, "*in order to reach a critical mass and to avoid pro-cyclical effects which would arise if the Fund had to rely solely on ex post contributions in a systemic crisis, it is indispensable that the ex-ante available financial means of the Fund amount to a certain target level*". Recital (61) further specifies that "*an appropriate time frame should be set to reach the target funding level for the Fund*".

56. The period of reaching the target funding level is of a paramount importance for the resolution policy of the Union since it affects the capacity of the Fund to be fully deployed in resolution.

57. The Proposal foresees that the target funding level should be reached over a period of 10 years. According to Art. 65(3), this initial period could be extended by the Board "*for a maximum of four years in case the Fund makes cumulated disbursements superior to 0.5% of the total amount referred to in paragraph 1*." While Art. 65(5) point c) empowers the Commission to adopt delegated acts setting criteria for determining the number of years by which the initial period may be extended, the decision whether the period is extended would rest with the Board. According to Art. 65(3), the Board would have the possibility (and not the automatic obligation) to extend the initial period, which entails a large margin of discretion which would affect the resolution policy of the Union referred to in paragraph 16 and therefore could be contrary to the *Meroni* case-law.

iii) Borrowing or alternative funding means

58. As Recital (58) indicates, "*it is necessary to ensure that the Fund is fully available for the purpose of the resolution of failing institutions*". It is indeed essential that the Fund benefits of the necessary amounts allowing it to effectively contribute to resolution actions. The borrowing and the alternative funding means would allow the Fund to efficiently intervene in resolution when the funding from the financial industry would be insufficient.

59. Considering the important consequences of the borrowing and of the alternative funding means on the Fund, several remarks need to be made on the role of the Board. According to Art. 68 (1), the Board would determine : whether "*the amounts raised under Article 66 are not sufficient to cover the losses, costs or other expenses incurred by the use of the Fund*"[35]; whether ex post contributions are not immediately accessible; and whether the alternative funding means according to Art. 69 are not immediately accessible on reasonable terms, without further specifications provided for by the Proposal. It would also have the option (and not the obligation) to request to borrow for the Fund. The CLS therefore considers that the Board would enjoy a wide margin of discretion in relation to borrowing, since the rules limiting its actions in this respect are not sufficiently precise.

60. Concerning the alternative funding means, according to Art. 69, the Board would be allowed to contract them although no clear specification of the types of instruments envisaged or of the borrowers is provided for in this provision. The CLS therefore considers that the possibility for the Board to contract virtually any financial instrument under Art. 69 without any framework entails a wide margin of discretion within the meaning of the *Meroni* case-law, thus going beyond the powers that the Board may be entrusted with.

[35] As mentioned in point 54, this would not constitute a sufficient framework for its decision making power.

iv) Investments

61. According to the explanatory memorandum to the Proposal, "*on the basis of 2011 data on banks and an estimated amount of covered deposits held in banks in the euro-area, the 1% target level for the Single Resolution Fund would correspond to around 55 billion Euros.*"[36] This means that the Resolution Fund would have at its disposal very important resources in terms of volume. The investment of such resources do amount to making policy choices within the meaning of the *Meroni* case-law.

62. The Board would administer the Fund and could in this regard invest the amounts held by the Fund according to Art. 70(3). While the Commission is empowered to adopt delegated acts to further detail the administration of the Fund, there is no limitation or framing of the investment strategy of the Board.

63. Considering the amounts the Fund may have at its disposal in a few years, such investment strategy could amount to a policy choice within the meaning of the *Meroni* case-law.

v) Use of the Fund in a resolution procedure

64. The use of the Resolution Fund constitutes, as mentioned in paragraph 16 above, one of the fundamental elements of the resolution policy of the Union. Hence, it has to be very precisely framed in order to avoid a wide margin of discretion for the Board in that regard.

[36] Page 15 of the Proposal.

65. The CLS notes that, while, in accordance with Art. 16, the Commission establishes the framework for the use of the Fund, it is the Board that determines the use of the Fund in relation with the concrete purposes exhaustively listed in Art. 71(1)[37]. Nevertheless, the Proposal does not specify further criteria allowing to frame the balance of different purposes by the Board in a specific situation. Indeed, both Art. 16(6) and 71(1) refer simply to the framework to be provided by the Commission when putting an institution under resolution without indicating the details of this framework.

66. There is therefore a risk that the framework established by the Commission would be an empty shell that would leave a wide margin of discretion to the Board. It is hence necessary to provide for a clear delimitation of the roles of the Commission and of the Board in the use of the Fund in order to exclude any such wide margin of discretion for the Board and to confine the intervention of the Board to purely executive tasks.

67. In the light of the above developments, the CLS considers that it would be necessary either to include in the Regulation further specifications in order to properly frame the powers of the Board related the use of the Fund or involve in the exercise of those powers an institution of the Union vested with executive competences.

[37] Those purposes are : to guarantee the assets or the liabilities of the entity under resolution, its subsidiaries, a bridge institution or an asset management vehicle; to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle; to purchase assets of the institution under resolution; to contribute capital to a bridge institution or an asset management vehicle; to pay compensation to shareholders or creditors in certain situations; to make a contribution to the institution under resolution in lieu of the contribution which would have been achieved by the write down of certain creditors, when the bail-in tool is applied and the resolution authority decides to exclude certain creditors from the scope of bail-in in accordance with Article 24(3) or a combination of them. Art. 24(7) (relating to the contributions from the Fund when certain liabilities are excluded or partially excluded from the bail-in) also provides for further limitations in this regard.

d) Sanctioning powers of the Board

68. According to the Recital (54), the aim of the fines and periodic penalty payments provided for in the Regulation is to ensure that decisions adopted within the framework of the resolution mechanism are respected. Because of their dissuasive and punitive functions, sanctions contribute to the effectiveness of the resolution action and therefore they are part of the resolution policy referred to in paragraph 16.

69. It is recalled that the CLS has already had the opportunity to pronounce itself on the possibility to delegate powers to impose sanctions on agencies[38]. While recognising that, in principle, the conferral of sanctioning powers on an agency is not contrary *per se* to the institutional balance set out by the Treaties, the CLS recalls that such powers need to be very clearly circumscribed.

70. The delegation of sanctioning powers has therefore to be made in a precise legal framework, should be limited in its scope, and the Board should not be given the discretion to choose the adequate punitive policy to apply.

71. As far as Art 36 or Art. 37 of the Proposal (which would empower the Board to instruct national resolution authorities to impose fines or periodic penalty payments) are concerned, the CLS notes that the situations which may give rise to fines or periodic penalty payments are well defined and that the Board is compelled to act when such situations occur. Nevertheless, there are no indications in the Proposal on how the fines or the periodic penalty payments should be calculated.

[38] See opinion 14010/10 concerning the delegation of the power to impose sanctions on credit rating agencies to the European Securities and Markets Authority.

72. According to Art. 36(4), the Board would issue guidelines on the application of fines and periodic penalty payments addressed to the national resolution authorities. Although those guidelines are not legally binding, they would nevertheless indicate the line to be followed by the Board when it would instruct national resolution authorities to impose fines or periodic penalty payments and therefore commit to a certain extent the Board as regards its future actions[39]. Moreover, since national resolution authorities themselves are part of the single resolution mechanism, it is very likely that they would follow the Board's guidelines when imposing fines or periodic penalty payments in accordance with Art. 36 and 37.

73. Since no framing of those guidelines is provided in the Proposal, the Board would enjoy a broad discretion to calculate the adequate level for the fines/ periodic penalty payments to be effective and proportionate. There is a risk that those guidelines, even if they are not legally binding, would set the punitive policy of the Union in the field of resolution.

74. Accordingly, it would be necessary either to include in the Regulation further specifications in order to properly frame the sanctioning powers of the Board or to involve in the exercise of those powers an institution of the Union vested with executive competences.

[39] In the field of competition, the Court has already considered, as regards codes of conducts (which are similar to guidelines), that "*In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects."* (judgment of 28 June 2005, Dansk Rørindustri / Commission ,C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, [2005] ECR I-5425, paragraph 211; judgment of 30 May 2013, Quinn Barlo Ltd and others/Commission, C-70/12 P, paragraph 53).

IV. CONCLUSION

75. The Legal Service considers that the powers which would be conferred by the Proposal on the Board relating to :

- the drafting of certain aspects of the resolution plan (the assessment of resolvability and the determination of the minimum requirement for own funds and eligible liabilities, or, where appropriate, contractual bail-in instruments);
- the possibility to grant simplified obligations or waivers in relation to the drafting of the resolution plan;
- the definition of certain aspects of the content of the resolution scheme (in particular related to the implementation of the resolution tools);
- the individual contributions (the possibility to set out rules related to the payment of contributions and the exemption from the extraordinary ex post contributions);
- the extension of the initial period for reaching the target level for the Resolution Fund;
- the borrowing from financing arrangements within non-participating Member States or the alternative funding means;
- the investment strategy of the Fund;
- the use of the Fund in a resolution procedure; and
- he sanctioning powers

need to be further detailed in order to exclude that a wide margin of discretion is entrusted to the Board, unless the legislator decides to involve in the exercise of those powers an institution of the Union vested with executive competences.